to prepare a general average statement covering all general average contributions to be paid or received in connection with the aforesaid average on the transport *Logan*. Johnson & Higgins of California undertook the preparation of a general average statement and completed and issued it on or about December 31, 1926 (R. 10, 11).

The general average statement stated the contributory values of the various interests involved on the voyage as follows (R. 11):

Hull:	
The contributory value of said vessel in sound condition was stated to be	$475,000.
Cargo:	
Cargo shipped by the War Department of the defendant	669,068.
Cargo of the American Red Cross	260,331.
Cargo of the Philippine Islands government and the Manila Railroad Company	190,503.
Personal property of Colonel S. E. Allen	1,851.
Personal property of Knute A. Johnston	445.

The general average statement also showed that net contributions were to be paid as follows:

By the War Department for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant as owner of the hull of the transport *Logan*	22,213.88
Total	$54,360.35

The general average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Company (for which sums the respondent herein is suing in this suit)	$48,099.40
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.12
To ditto for commissions as collecting and settling agents	1,821.82
Total	$54,360.35

On May 28, 1928, the General Accounting Office notified respondent that its claim for allowance and payment of general average had been rejected. The respondent made application to the General Accounting Office for a review of the disallowance of the claim, and on December 10, 1928, the Comptroller General of the United States notified respondent that the disallowance of the claim had been sustained and refused to pay any part of the claim (R. 11).

Questions Presented.

1. Does an action for general average contribution lie by a cargo owner against the United States, as owner of an Army transport which carried such cargo?

2. Is an action brought by a cargo owner for general average contribution against the United

States as owner of the carrying vessel, upon a general average statement prepared on behalf of the latter, barred by the statute of limitations because not started within six years after the arrival of the vessel at destination, although started within six years after the issuance of such general average statement?

3. Does the judgment violate Section 177 of the Judicial Code in that the general average statement included interest computed upon debits against, and credits in favor of the petitioner to the time of the issuance of the statement?

Summary of Argument.

I.

The claim in question is either founded upon an implied contract with the United States, or is for damages, liquidated or unliquidated, in a case not sounding in tort in respect to which the respondent would be entitled to redress against the United States in a court of equity or admiralty if the United States were suable, and was therefore properly within the jurisdiction of the Court of Claims.

II.

Although the *Logan* could not have been sued *in rem,* it does not follow that the United States is not liable *in personam* for general average. When the sovereign has consented to be sued, its rights and liabilities are judged in the same manner as if it had been a private party. The cases generally recognize no distinction between the commercial or public character of the service upon which a vessel is engaged for the purpose of determining the liability of the Government in general average, salvage, or collision.

Although it is immaterial, the Government's contention that the *Logan* was engaged in military operations is not supported by the evidence.

III.

A cause of action *in rem* for general average arises against the vessel on arrival at the port of destination. Such an action is primarily to obtain security and would result in the preparation of a general average statement by the Court through an average adjuster acting as special master. The vessel owner is under a duty to prepare a general average statement. Another cause of action in favor of the cargo owner arises after preparation and issue of the general average statement by the vessel owner, in which the cargo owner may recover the contribution shown to be due him in such statement. The statute of limitations does not begin to run on the latter cause of action until the general average statement is completed and issued. A contrary rule would cause needless litigation and confusion, and render impossible the universal practice of stating and collecting general average by adjusters employed by the vessel owner.

IV.

The respondent wrote its insurance upon the goods of the Philippine Islands Government and the Manila Railroad Company under valued policies of marine insurance and paid the losses in full. Under such circumstances, it is entitled by subrogation to sue the United States, as owner of the *Logan*, and to recover the full amount of general average contribution with respect to the insured goods.

V.

Although the general average statement, as prepared, included interest on debits and credits from the date of the arrival of the *Logan* at Manila to the approximate date of the issuance of the statement, the United States cannot question such interest, because the statement was prepared by its own adjusters. The inclusion of such interest is in accordance with general practice. Since the cause of action in general average did not arise until the issuance of the general average statement and is based upon such statement, there is no interest allowed upon an over-due account within the prohibition of the statute. A general average statement involves mutual credits and debits, and the United States obtained the benefit of interest upon items with which it was credited.

There is an analogy to those cases in which the United States, although not suable for a particular occurrence, enters court as a litigant in connection with such matter, and it is thereafter held to be subject to all the rules applying to a private litigant, including the payment of interest. Interest has also been held to be payable upon a condemnation award against the Government for property taken for its own use. In the present case, the United States, acting through the Captain of the *Logan,* deliberately chose to flood the hold of the vessel with water in order to extinguish the fire, and thereby destroyed the plaintiff's cargo in order to save its own interest in the hull and other cargo of the vessel. This was a deliberate destruction of plaintiff's property for the petitioner's own benefit.

Argument.

POINT I.

The Court of Claims had jurisdiction.

Under the so-called Tucker Act (24 Stat. 505, 36 Stat. 1136), 28 U. S. C. A., Sec. 250 (1), the Court of Claims is given jurisdiction "of all claims founded upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable". A claim for general average is cognizable in the Court of Claims upon the ground that it is a claim for damages liquidated or unliquidated, not sounding in tort, in a case which could be brought against the United States in a court of admiralty if the United States were suable, and possibly also upon the ground that it is an implied contract. It was held in *Brown* v. *United States,* 15 Court of Claims, 392, that the United States might be sued for a general average contribution due to the owners of a merchant vessel upon which goods belonging to the United States had been shipped.

Salvage claims, even in the absence of any express contract, have been held to fall within the scope of the Tucker Act.

United States v. *Cornell Steamboat Company,* 202 U. S. 184;
The Davis, 10 Wall. 15;
McGowan v. *United States,* 20 Court of Claims, 147;
United States v. *Morgan,* 99 Fed. 570.

The similarity between claims for salvage where no express contract has been made and claims for general average has been recognized by the Courts.

The Davis, supra;
Abbott's Merchant Ships and Seamen, 14th Ed. (1901), page 751.

POINT II.

The voyage of the *Logan* was subject to general average rules.

Stripped of all high-sounding phrases, such as "common maritime venture" and "property having a public status", the Government's argument in Point II appears to be: (1) that the transport *Logan* was engaged in military operations; (2) that no lien liability for general average contribution could arise, and (3) therefore there can be no liability *in personam* against the Government.

We contend that (1) is not true, but it is immaterial; we admit (2), but we contend that (3) is a *non sequitur.*

It makes no difference whether the *Logan* was engaged in a military operation. In fact she was a public vessel, owned by the Government, and immune from attachment, seizure, or any proceeding *in rem.*

The proposition that, because no liability *in rem* against the vessel may be enforced, no liability *in personam* arises against the owner of the vessel is completely answered by this Court in *Workman* v. *City of New York,* 179 U. S. 552, 572. A libel was filed against the City of New York for damages resulting from a collision between a fireboat, owned and operated by the City, and a barkentine. It was urged that no action could be maintained against the

City of New York because the fireboat was engaged in the public service of fighting a fire and could not be attached. This Court reversed the Circuit Court of Appeals and allowed full damages against the City. This Court said:

> "* * * even if it be conceded that the fireboat could not have been seized by process from a Court of Admiralty, the proposition that, therefore, the owner could not be called upon, in an action *in personam,* to respond for the damages inflicted by the boat, is without foundation" (p. 572).

In *United States* v. *The Thekla,* 266 U. S. 328, the steamer *F. J. Luckenback,* while being operated by the United States in war service, collided with the barque *Thekla.* The owners of the *Luckenback* filed a libel and a cross-libel was filed by the owners of the barque, and the two actions were consolidated. Thereafter, a motion of the United States to intervene as a party libelant was granted, and the Government sued upon the libel of the owner of the *F. J. Luckenback.* Upon the trial it appeared that the United States was owner *pro hac vice* of the steamship and that the steamship alone was at fault. It was held that the Government had waived its immunity by intervening, and that it was liable under the cross-libel filed by the owner of the barque to the same extent as if the Government-operated vessel had been privately owned. The sole question considered by Mr. Justice Holmes was whether the Government by intervention submitted itself to the jurisdiction of the Court so as to permit a decree to be entered against it. A decree awarding damages in tort against the Government *in personam* was sustained by this Court, although the vessel clearly could

not have been attached and although the vessel was actually being operated by the Government in war service. See also *In re United States Steel Products Company,* 24 Fed. (2nd) 657 (C. C. A. 2, 1928).

The cases generally recognize no distinction between the commercial or public character of the service upon which the vessel is engaged for the purpose of determining liability of the Government in general average, salvage, or collision. In *Brown* v. *United States,* 15 Ct. Cls. 392, the Government was held liable to contribute in general average for military supplies which were being shipped to the Quartermaster of the United States Army. In *Prince Line, Ltd.* v. *United States,* 61 Ct. Cls. 632, the Government was held liable for salvage services rendered to a privately-owned vessel while it was being operated by the Government in war service. In *United States* v. *Wilder,* 28 Fed. Cas. 16694, Mr. Justice Story, after an exhaustive consideration, decided that property of the United States was subject to contribution in general average to the same extent as property privately owned. See also Phillips, Insurance, Vol. 2, Section 1345; Arnould, Marine Insurance, 11th Ed., Vol. 2, Section 973.

Thus the fact that there is no liability *in rem* against the vessel, or that the vessel is engaged in military or other public service, has no bearing on the question of the liability *in personam* of the United States.

The sole question is whether the Government has waived immunity from suit, or has consented to be sued. We have shown in Point I that the Government has consented to be sued for a contribution in general average in the Court of Claims.

The question whether a vessel is engaged on a public mission has no bearing on the real purpose of

the doctrine of general average, viz., to permit the master to exercise his best judgment in time of stress and danger in the selection of the interest to be sacrificed to save the adventure. If the doctrine of general average is not applicable to voyages of Government vessels on a public mission, the master might well feel an obligation to sacrifice cargo owned by others rather than any property of his employer, the Government.

The fundamental purpose of general average is well set forth in *Lowndes on General Average,* 6th Ed., pp. 14, 15:

> "Nothing can more tend to the preservation of life and property at sea than that the officer entrusted with this important function should be protected in the exercise of it from whatever may tend to bias or disturb his judgment at that critical moment. He is, however, the paid servant of the shipowner, liable to dismissal if he displeases him. How is he to avoid partiality, or the suspicion of partiality, when he has to determine by what sacrifice he shall avert a common danger, and to choose, perhaps, between a jettison of cargo and the cutting away of a mast, or bearing up for a port of refuge? Will there not be frequent complaints, well or ill founded, by the merchant or his underwriters, that a costlier sacrifice of cargo has been preferred when a measure less destructive, but involving a loss to the shipowner would have been equally effectual? The rule of a general contribution, on the other hand, by rendering it immaterial whose property is taken in the first instance, and material only that that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the

captain's mind between interest and duty, leaves him alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of general average thus no doubt explains its universality and permanence."

In the leading case of *Barnard* v. *Adams,* 10 How. 270, this court set forth the three requisites of general average at p. 303:

"In order to constitute a case for general average, three things must concur:

1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable', except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2d. There must be a voluntary jettison, *jactus,* or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa,* or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3d. This attempt to avoid the imminent common peril must be successful."

All three of these requisites specified by this Court were present in the case at bar: (1) The fire on the transport *Logan* was admittedly and obviously a common danger to ship and cargo. (2) The use of water to extinguish a fire at sea has been repeatedly held to be a voluntary sacrifice. *Ralli* v. *Troop,* 157 U. S. 386. (3) The fire was extinguished, and the transport *Logan* and her cargo arrived safely

at destination, although the cargo insured by the respondent was seriously damaged by the sacrifice.

If the sacrifice had been on the part of the vessel, such as cutting the decks or incurring port of refuge expenses, there would have been no question but that the cargo would have been compelled to contribute, and the question whether the vessel was engaged in military operations would have been immaterial. Surely, the doctrine of general average, which is equitable in its nature, should be enforced against the Government as well as in the Government's favor. In the present case, there is no question but that the United States as owner of the vessel benefited by the sacrifice of the cargo insured by the respondent in the saving of its vessel, which otherwise would have been lost or seriously damaged by the fire.

Although we believe it is immaterial, the Government's contention that the transport *Logan* was engaged in military operations is not supported by the evidence. The voyage commenced almost a month after the Armistice; the *Logan* sailed from San Francisco on December 5, 1918, with cargo consigned to various ports on the other side of the world from the theatre of war (R. 8). The *Logan* was carrying the goods in question because the war emergency had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic (R. 8). There is no evidence in the case as to the nature or character of the cargo belonging to the United States on board the *Logan*. The cargo insured by the respondent consisted of miscellaneous supplies, principally stationery, books and medical supplies (R. 9). Clearly, therefore, the *Logan* was not engaged in military operations, at least so far as the cargo insured by the respondent is concerned. It is not contended that the absence of freight pay-

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able by the consignee changed the character of the service from a commercial service into a military operation.

The relationship between the cargo insured by the respondent and the transport *Logan* was in fact merely that of cargo and carrying vessel. The goods and the vessel belonged to different legal entities that were distinct and separate from each other. It was only because of the shortage of commercial vessels that the carriage was made on an army vessel. The common venture, which is the basis of general average, is not the hope of gain on the part of the vessel owner, but is the physical venture of a vessel putting to sea with cargo on board, and encountering the risks incident to such voyage.

POINT III.

The cause of action is not barred by the Statute of Limitations.

A six year statute of limitations is provided for suits in the Court of Claims Act of March 3, 1911, Ch. 231, Sec. 156, 36 Stat. 1139. The question is whether this statute began to run from January 19, 1919, the date of the arrival of the transport *Logan* at destination, or from December 31, 1926, the date on which the general average statement was issued. The petition was filed in the Court of Claims on February 18, 1929.

The Court of Claims upheld respondent's contention that the six year period of limitation in the present action did not begin to run until the issue of the general average statement in 1926.

The case most closely in point is *The Allianca,* 64 Fed. 871 (S. D. N. Y.—1894), affirmed 79 Fed. 989 (C. C. A. 2—1896). This was a suit by an

underwriter on cargo to enforce a claim for general average against the proceeds of the vessel. The voyage was from New York to Rio in June, 1889. In December, 1889 a mortgage was executed on the vessel to a mortgagee who had no knowledge of the claims in general average. The shipowner became insolvent in February, 1893, and the libel to recover general average was filed on June 30, 1894. The defence was laches, and the mortgagee claimed to have been prejudiced by the delay in the bringing of the suit to collect the general average. Judge Addison Brown, whose decisions in admiralty are accorded the highest respect, held in the District Court that the libelant had not been guilty of laches, since the general average statement had not been issued until nearly a year and a half after the mortgage was given. He said at page 873:

> "Although the jettison that gave rise to the lien happened before the mortgage was executed, the average was not adjusted, nor was any claim upon the ship capable of enforcement, until nearly a year and a half after the mortgage was given. Up to that time the lien was inchoate only, and there were no laches."

The Circuit Court of Appeals, Second Circuit, affirmed on Judge Brown's opinion, 79 Fed. 989.

This case was cited with approval in *Frederick H. Leggett & Co.* v. *500 Cases of Tomatoes,* 15 Fed. (2nd) 270 (C. C. A. 2—1926) which involved the question whether a shipowner was entitled to insist upon payment in cash of the contribution estimated to be due from cargo as a condition to the delivery of such cargo to the consignee. The court held that the consignee of the cargo was entitled to the goods upon presentation of a general average bond with

sufficient surety. Judge Hough, another outstanding admiralty Judge, writing the opinion of the court, said, in referring to the lien for general average:

> "Until an adjustment is made, the lien under consideration is inchoate; it attaches, but its amount cannot be ascertained until adjusted." Citing *The Alhanca, supra.*

On the other hand, reciprocal rights of action *in rem* by vessel owner against cargo, and by cargo owner against vessel, to secure the lien for general average contribution, unquestionably exist at the time of the arrival of the vessel. Unless the vessel owner were entirely responsible, and resided at the port of destination, the cargo owner might be greatly prejudiced from a practical point of view by allowing the vessel to depart from the port without attaching her and obtaining security. Likewise the vessel owner might be greatly prejudiced if he could not enforce his lien against the cargo before delivery. The almost universal practice, however, is for the vessel owner to take a general average bond before delivery of the cargo. The cases establishing the existence of such reciprocal actions *in rem* to obtain security for general average contributions between vessel and cargo at the time the vessel arrives and before a general average statement is prepared, are as follows:

Cases against vessel:

> *Dupont* v. *Vance,* 19 How. 162 (1856);
> *"The Eugenia J. Diacakis",* 1923 A. M. C. 305 (S. D. N. Y., 1923).

Case against cargo:

> *Wellman* v. *Morse,* 76 Fed. 573 (C. C. A., 1—1896).

See also:

Frederick H. Leggett & Co. v. *500 Cases of Tomatoes, supra.*

The Government relies on a dictum of Judge Learned Hand in *Det Forenede Dampskibs Sellskab* v. *Insurance Company of North America,* 31 Fed. (2nd) 658 (C. C. A., 2nd—1929). This case involved the date on which the rate of exchange should be fixed in computing payments to be made by cargo on a general average adjustment and involved no question of laches or statute of limitations. He held that the lien upon cargo for general average contribution arose at the arrival of the vessel and that a right of action upon an implied promise to pay by the cargo owner arising upon delivery accrued at that time, and the rate of exchange on that date was adopted. Judge Hand considered only the question whether a general average adjustment was a condition precedent to a right of action. In other words, all that he was interested in was to determine whether *any* cause of action arose at the time of the arrival of the vessel at destination. In discussing *"The Alliance"*, he clearly distinguished the question of laches from the question as to the date as of which the rate of exchange should be computed.

In the case at bar, no action *in rem* could have been maintained against the transport *Logan,* because she was a public vessel. *"Western Maid"*, 257 U. S. 419; *"The Siren"*, 7 Wall. 152. Even if she had been a private vessel, we contend that the right of action which would have arisen at the time of the arrival of the vessel would have been in the nature of an action to obtain security by the enforcement of a lien, rather than a suit upon a liquidated obligation.

We submit that it is apparent from the above authorities that a cargo owner has two causes of action upon a general average sacrifice, one arising upon the arrival of the vessel, and the second arising upon the completion of the general average statement by the vessel owner.

The cause of action upon the general average statement differs from the earlier cause of action dating from the arrival of the vessel, in that it is based upon the statement, which is binding upon the ship owner, at least in the absence of mistake or fraud. *The Santa Ana,* 154 Fed. 800 (C. C. A.—9, 1907). It is an action for a definite sum owing by one or more designated interests, whereas a suit started upon the arrival of the vessel is merely to have a general average stated and to recover such amounts, if any, as libelant may eventually be found entitled to.

Upon the arrival of the vessel at destination, where a general average sacrifice has occurred in the course of the voyage, the ship owner still has the following duties to perform with reference to general average:

1. He must obtain either a sufficient deposit of cash or sufficient security to cover possible contributions in general average owing by the respective shipments of cargo before delivering the same.

2. He must prepare or cause to be prepared by an average adjuster the general average statement showing the computation of general average and the amounts payable and receivable by the respective interests.

3. He must either himself or through his agent, the average adjuster, collect the net amounts payable by the debtor interests in general average and disburse such amounts to the creditor interests.

This Court has held that the United States as owner of the transport *Logan* was under a duty to prepare or cause to be prepared the general average statement in the present instance. Johnson & Higgins of California were employed as average adjusters by the War Department to prepare the general average statement, and after it was completed, the Comptroller General refused to approve of the payment of their fee. The Supreme Court reversed the decision by the Court of Claims (74 Ct. Cl. 331) which had supported the ruling of the Comptroller General. *Johnson & Higgins of California* v. *United States,* 287 U. S. 459. Chief Justice Hughes, writing the opinion, said in part as follows:

> "The Solicitor General, while not formally confessing error, and while reserving the question whether the Government was liable to contribute in general average, is in accord with petitioner's contention that the proper officer of the Government was authorized to employ petitioner for the purpose stated. We are of the opinion that this view is correct. In the circumstances, petitioner's right did not depend upon the determination of the liability of the Government to contribute in general average. The question of that liability could not be regarded as free from doubt. The cargo underwriters had made claim for contribution and the Judge Advocate General of the Army had advised that the claim was valid. On receiving this information, it was the duty of the officer responsible for the operation of the vessel to prepare the general average statement in order that the basis for adjustment might be available. *Ralli* v. *Troop,* 157 U. S. 386, 400. That duty, in this instance, apart from the question of the liability of the Govern-

> ment for general average as to which it is not now necessary to express an opinion, lay with the general superintendent and administrative officers of the Army Transport Service, and in order that he might properly perform it, he was entitled to avail himself of the assistance of general average adjusters."

The duty of the shipowners to prepare a general average statement was also clearly laid down in the *Emilia S. De Perez,* 22 Fed. (2nd) 585 (D. C. Md. 1927), in which the Court stated as follows:

> "From the very origin of general average it appears to have been the duty of the master, as representative of the shipowners, to make general average adjustments. The master has universally and consistently been looked upon as the responsible party. *Ralli* v. *Troop,* 157 U. S. 386, 400, 15 S. Ct. 657, 39 L. Ed. 742. The custom has, to be sure, grown up of engaging adjusters for convenience sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases. But there is no custom which substitutes, in the eyes of the law, the adjuster for the master. As has been pointed out, it would be wholly impracticable for each cargo owner to sue every other cargo owner separately and to try to make up an adjustment piecemeal. Some one must act as trustee, with the responsibility of perfecting the adjustment, and it has been consistently held that this duty rests upon the master (representing the owner) of the ship."

Until the vessel owner has expressed an intention to refuse to perform these obligations, or until he has failed to perform them after the lapse of a reasonable

time, there is no basis or reason for the cargo owner to sue him *in personam*. The plaintiff in the present case, after the Judge Advocate General had held that general average was properly payable by the Government to the plaintiff, and after the War Department had employed Johnson & Higgins of California to prepare a general average statement, would have been ridiculous in instituting an action against the United States which would have resulted in the preparation of a general average statement by the Court, with a duplication of expense, and in the assumption by the plaintiff of the burden of proving facts wholly within the knowledge of the War Department.

We have found no case where a right of action *in personam* against the vessel owner has been maintained at the time of the arrival of the vessel at destination and before the shipowner has caused a general average statement to be prepared, or has failed or refused to cause the preparation of such statement. The Court below held that no right of action *in personam* against the United States existed prior to the issue of the general average statement (R. 14, 15).

If such an action *in personam* could be maintained, its purpose would be to have the Court appoint some general average adjuster as Special Master to prepare a general average statement. The cargo owners would then be obliged to assume the burden of proving the facts necessary to a general average statement, such as value of the vessel, the sound values of all the cargo on board, the amount of freight, the amount of damage resulting from the general average sacrifice to the vessel, to the various lots of cargo, and to the freight. This is a serious burden for cargo owners to assume. The maritime law, however, places the duty of assembling all these facts

and figures and preparing a general average statement upon the vessel owner. *Johnson & Higgins* v. *U. S.*, 287 U. S. 459, *supra*. The vessel owner either has knowledge of all the above facts and figures or has ready access to the means of obtaining them; whereas the cargo owner has neither. Moreover, in the interests of order, it is necessary that one person should undertake the gathering of the necessary information, the preparation of the necessary computations therefrom, the collection of the payments and their distribution, and this duty the law has quite properly imposed upon the vessel owner. The rule which the Government proposes would deprive cargo owners of the benefit of this duty, and would reach the extraordinary result that although the law had imposed upon the vessel owner the duty of preparing the general average statement and carrying out the details of its adjustment, and although such duty had been imposed for the benefit of cargo owners, cargo owners must at their peril bring suit within six years after the arrival of the vessel and without waiting to receive the benefit of the performance of the vessel owner's duty. In other words, the lapse of time might deprive cargo owners not only of the benefit of the performance of the duty by the vessel owner, but even of the right to recover contribution at all, and this might be so even though the vessel owner was continuing to perform his duty and had not repudiated the same. Although the duty imposed upon the vessel owner for the benefit of cargo owners is presumably of substantial benefit and value to the latter, the vessel owner would not only be relieved from completing performance of such duty, but would also be relieved from any liability even to contribute in general average, if the

vessel owner had not within six years after the arrival of the vessel completed the performance of his duty with reference to the general average. Any such contention, if supported, would not only vitiate the underlying reason for imposing the duty upon the vessel owner to adjust general average, but would also defeat the whole scheme and practice of general average and would be a travesty upon justice.

There are many analogies of successive causes of action in connection with the statute of limitations. The closest analogy is the case of anticipatory breach of a contract, where the injured party may either bring suit immediately upon the first breach, or may treat the contract as continuing and wait until the time has elapsed for complete performance. In *Foss-Schneider Brewing Co.* v. *Bullock,* 59 Fed. 83 (C. C. A. 6, 1893), the seller refused to accept a breach of contract by the purchaser of goods to be delivered over a period of time, but, on the contrary, proceeded to tender further deliveries of goods and sued for the contract price. The defendant pleaded that the cause of action had arisen when the original breach occurred, and that the period of the statute of limitations had run in the meantime. The Circuit Court of Appeals, Sixth Circuit, Mr. Justice Taft writing the opinion, held that the cause of action accrued, not at the time of the first breach of contract by the purchaser, but at the time of the final tender of goods and subsequent refusal by the purchaser to accept them, and that the statute of limitations was consequently no defense.

The same rule was applied in *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255, and in *Roehm* v. *Horst,* 178 U. S. 1.

In *Ga Nun* v. *Palmer,* 202 N. Y. 483, decedent had made a contract to pay the plaintiff a certain sum

per month and a certain amount at the time of decedent's death for taking care of decedent. The decedent during his lifetime did acts which constituted a breach of the contract, and after decedent's death, the plaintiff brought suit against decedent's estate for breach of the contract. It was held that the statute of limitations ran from the date of final breach by decedent, namely, the date of decedent's death, even though suit might have been brought at an earlier date. Similar decisions are *Wold* v. *Wold*, 138 Minn. 409; *Heery* v. *Read*, 80 Kan. 380.

In one sense, the anticipatory breach cases lay down a rule which is even more liberal to the plaintiff in respect to the statute of limitations than is necessary to permit recovery by the plaintiff in the present case. In the usual anticipatory breach case, there has been a refusal to perform by the defendant at some time prior to the final act of performance due from the defendant, and the plaintiff, though thus put on notice that the defendant will not perform, nevertheless goes ahead and performs the contract. In the present case, the Judge Advocate General ruled that there was general average payable, and the defendant proceeded to perform the obligations on its part by causing a general average statement to be prepared, a proceeding which covered the period from August, 1922, to December 31, 1926. It was not until the refusal of May 28, 1928, by the Comptroller General to approve of the payment by the United States of its share of the contribution that there was any refusal by the United States to perform its obligations. Thus the Government was performing its obligations and gave no intimation of a refusal to pay until May 28, 1928. This suit was started within nine months thereafter, or within two months and eight days after the application for

a review of the disallowance of the claim had been denied on December 10, 1928, by the Comptroller General. Under these circumstances any claim that the suit should be barred by limitation is inequitable and without basis in law.

Another close analogy is to be found in the cases where there are two successive times fixed by a contract for the performance of an act. Thus, in the case of a note payable on demand or at death, it was held that the holder might wait until the death of the maker, and that the statute of limitations began to run from that date, although, had the note been merely payable on demand, the statute of limitations would have barred suit thereon. *Harris* v. *Townsend,* 101 Miss. 590.

Likewise in the case of a mutual open account between two parties where there has been an account stated, the statute of limitations begins to run from the date of the statement of the account.

Louisville & N. R. R. Co. v. *United States,* 47 Ct. of Cl. 129 (1911);
Morgan v. *Lehigh Valley Coal Company,* 215 Penn. 443 (1906);
Figge v. *Bergenthal,* 130 Wis. 594 (1907);
Ellison v. *Weintrob,* 139 Va. 29;
Slayback v. *Alexander,* 179 App. Div. (N. Y.), 696 (1917).

On the other hand, had there been no statement of account in such a situation, the statute of limitations would run from the date of the last item in the account.

Green v. *Disbrow,* 79 N. Y. 1 (1879);
Minion v. *Warner,* 238 N. Y. 413 (1924);
Kennedy v. *Drake,* 225 Mass. 303.

The analogy between an account stated and a general average statement is obviously close. The Government on page 14 of its brief objects to the analogy to an account stated on the ground that there is no authority in an executive officer or agent of the Government to issue an account stated after the statute of limitations has barred a cause of action. The situation is quite different, however, from an ordinary account stated in that in the ordinary case there is no duty to state an account; whereas in the case of general average it has been held to be the duty of the vessel owner to prepare and issue the general average statement. *Johnson & Higgins* v. *United States, supra.* The respondent does not contend that a general average statement is in all respects an account stated, but does urge that for the purposes of the statute of limitations there is a close analogy.

The rule that the statute of limitations in a suit brought upon the general average statement does not begin to run until the issue of the statement by the adjusters accords with commercial practice and business necessity (R. 12). General average adjusters, both in England and America, are men of specialized training and of the highest integrity and character and they are looked upon as professional men. This indicates the complexity of a general average statement and also indicates that a general average statement prepared by a well-known adjuster, even though employed by the vessel owner, has almost the binding effect of an arbitration. In practice it is extremely rare that a general average statement prepared by such an adjuster as Johnson & Higgins is ever questioned. It would thus be an encouragement to fruitless litigation to require a cargo owner to bring suits before the general average statement is issued.

The custom of deferring collection and distribution of general average payments until after the preparation of the statement (R. 12) is based not merely on convenience but on necessity. The facts which are the necessary basis for preparing a general average statement are numerous and complicated, and must be gathered frequently from widely separated and distant points. Briefly outlined, it is necessary to obtain at least the following information:

1. The sound value of the vessel;

2. The amount of any damage occurring to her during the voyage either by reason of general average sacrifices or otherwise;

3. The sound value of each shipment of goods at port of destination;

4. The amount of damage other than general average occurring to each shipment of goods in the course of the voyage;

5. The amount of general average sacrifice as to each shipment of goods during the voyage;

6. The amount of all expenditures made either by the vessel or by any other person which were general average expenditures.

The proper ascertainment of the foregoing facts involves the procuring of detailed and elaborate surveys and reports, and, after all the data has been assembled, the making of complicated computations. Until the statement has been prepared, it is impossible to know the amount which is to be paid or to be received by each of the interests involved in the voyage and, accordingly, the making of the payments and the distribution of the payments thus made must of necessity await the issue of a general average statement. In cases involving complicated facts, and particularly where correspondence between distant ports is neces-

sary, the preparation of a general average statement may be delayed, as in the present case, for years after the arrival of the vessel at the port of destination, even although the average adjusters proceed with all due diligence. Were the rule that the statute of limitations is to begin to run from the date of the arrival of the vessel at the port of destination, it would make it well nigh impossible for the average adjusters to work out the adjustment of the average in the usual and orderly course of business, since each interest which was, or had any reason to believe that it might possibly be, a creditor in general average would be forced to start suit, before the end of six years from the arrival of the vessel, against all other interests which might be debtors in general average. On the other hand, the interests which might be debtors would be not only the vessel owner, but the owners of any other shipments of goods on the vessel, and this in turn might entail a large number of suits, possibly in many different jurisdictions, since the owners of different shipments of cargo might well be scattered throughout the world. The fact that suits might eventually have to be brought to protect the interests of each of the creditors in general average might mean that it would in each instance become necessary to start suit upon arrival of the vessel when the debtor cargo or vessel was at hand instead of waiting and permitting the debtor interests to disperse. Such a practice would be expensive and highly inconvenient to all concerned, both creditor and debtor interests alike.

The practical result of applying the rule that the statute of limitations runs from the date of the arrival of the vessel at port of destination would be so disastrous and so contrary to commercial practice as to throw the strongest doubt upon the soundness of such a rule.

POINT IV.

The respondent as insurer was entitled to the full amount of the award of the Court of Claims.

The United States contends in Point III of its brief that an insurer may recover in its own name by subrogation not more than the amount of the loss that it paid to the assured and that therefore the award of the Court of Claims was excessive. The cases cited on page 24 of its brief, however, do not support the proposition for which they are cited. *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, and *Norwich Union Fire Ins. Soc.* v. *Standard Oil Company,* 59 Fed. 984 are not in point because in each an underwriter had sued in its own name when it appeared that it had insured only a part of the interest. The other cases cited involve other irrelevant propositions.

In the present case, although the policies of insurance are not printed in the present record, they were in evidence in the Court below, and a reference to them will show that they were valued policies, and it is stated in the record that the full amount of the losses was paid (R. 10). There was no other insurance involved, and the record fails to disclose any facts showing that the original owners of the goods, having been paid their losses in full by the plaintiff, retained any interest whatsoever in the proceeds of the litigation. If there were any question present concerning a recovery in excess of the loss paid by the underwriter, it would arise only between the underwriter and the assured, and it would be no concern whatever of the debtor. *Propellor Monticello* v. *Mollison,* 17 How. 152.

In *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, at 594, this Court said, in considering the right of subrogation:

> "Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of its value will give them the whole *spes recuperandi,* and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy."

No case has been found where an underwriter has paid the entire loss under a valued marine policy and has been denied the right to bring suit in its own name to enforce a subrogated right. There can be no question but that the owners of the goods could have sued in their own right in the present case, and since no uninsured interest is shown to have been left in the assured, it would be a denial of the full right of subrogation to hold that the plaintiff underwriter may not enforce fully its subrogated rights.

As a matter of fact, the amount of the original contribution in general average which is recoverable by a cargo owner from the other interests, could never equal, much less exceed, the amount of the loss or damage to the goods, because the amount made good in general average to the owner of goods which have been sacrificed is always diminished by the percentage of loss to be borne by each interest at stake. The plaintiff, having insured the goods against marine risks, including fire, therefore paid the full amount of the loss and is subrogated only to the claim of the

owner in general average, which is inevitably smaller in amount than the original loss. In the present case, the aggregate of the losses paid by the plaintiff to its assured was $38,996.22, and the original amount of the allowance in general average with reference to the goods of the Philippine Islands Government and the Manila Railroad Company totaled $38,133.76. The fact that subsequent adjustments increased the latter amount to the amount of the judgment, does not show that the assured is recovering more than the amount of its loss in such a sense that any rule of subrogation would declare the recovery to be excessive. It must be remembered that the payments of losses to the assured were made in 1919, 1920 and 1921, and that the payment by the United States to the plaintiff will not be made until 1935, some fourteen to sixteen years later, and that the underwriter has been deprived of the use of the money in the meantime. There is hardly, therefore, any question of profit on the part of the underwriter involved in the present case.

POINT V.

The judgment of the Court below did not erroneously include interest.

The general average statement, as prepared, included interest on both debits against and credits in favor of the Government, from the date of the arrival of the vessel at Manila to a period several months subsequent to the date of issuance of the general average statement. This is in accordance with the usual practice in the preparation of a general average statement. Congdon, General Average, 2nd Ed. page 165. Rule 2 of the Rules of Practice of the Association

of Average Adjusters of the United States, quoted on page 187 of Congdon, states as follows:

> "Where allowances, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment."

The general average statement was prepared by Messrs. Johnson & Higgins, experienced general average adjusters employed by, and acting under the direction of, the defendant. The defendant should not therefore be heard to object to the provisions of a statement so prepared.

The cause of action upon which this suit was brought arose upon the issuance of the general average statement and is based upon the net credits shown in such statement to be due to respondent's assured. There is therefore no question of a violation of Section 284 of Title 28 of the United States Code. No interest has been allowed by the judgment of the Court for the delay subsequent to the arising of the cause of action upon the issue of the general average statement.

In this case it would be virtually impossible to have prepared a statement which would have included the computation of interest in favor of and against the parties other than the United States, but would have embodied no interest either for or against the United States. In the case of the general average statement as issued, the interest which was computed on items in favor of the United States, was, of course, applied to diminish the amount payable by the United States, and correspondingly the amount receivable by the plaintiff. The computation of interest up to approximately the date of issue of the general aver-

age statement was therefore inextricably involved in the preparation of such statement and in the making of proper adjustments between the interests at stake.

It is generally held that interest is payable upon a condemnation award against the Government for the value of property condemned and on claims for property taken by the Government for its own use without the formality of condemnation.

> *Phelps* v. *United States,* 274 U. S. 341;
> *Jacobs* v. *United States,* 290 U. S. 13;
> *United States* v. *Rogers,* 255 U. S. 163.

The theory of these cases is that interest is an integral part of the claim for compensation and is allowable despite the provisions of Section 284 of Title 28 of the United States Code. In *The Nuestra Senora de Regla,* 108 U. S. 92, the Government was held liable not only for the charter hire of a foreign vessel which the Army had used without the owner's permission, but was also held liable for full interest thereon.

The allowance of general average to the plaintiff against the United States in the case at bar is in reality the payment of compensation for property taken by the Government for its own benefit. The Government, acting through the captain of the *Logan,* deliberately chose to flood the hold of the vessel with water in order to extinguish the fire, and thereby destroyed the plaintiff's cargo in order to save its own interest in the hull and certain other cargo of the vessel. This was a deliberate destruction of plaintiff's property for the benefit of defendant's property. The plaintiff under the authority of the foregoing cases is entitled to just compensation, which includes interest.

In *Standard Oil Company* v. *United States*, 267 U. S. 76, an action was brought against the United States on a policy of war risk insurance on a vessel. The question arose as to whether interest could be recovered against the United States from the date of the casualty to the date of the judgment, and this Court said at page 79, in holding the United States liable for such interest:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suit in such business."

In *United States* v. *Thekla*, 266 U. S. 328 (*supra*, p. 11), this Court included interest on damages for collision in a judgment against the Government in a case in which the Government intervened. In *Noamlooze etc.* v. *Moran Towing & Transp. Co.*, 11 Fed. 2nd 377 (S. D. N. Y. 1925) interest was allowed against the Government upon a counterclaim.

On pages 25 and 26 of the Government's brief, it is contended that the recovery by the plaintiff should be cut down to $29,223.68 by the elimination of the item of $18,875.72. An examination of pages 42, 49 and 53 of the general average statement, however, shows that the gross debit in general average against the Philippine Islands Government and the Manila Railroad Company of $8,909.08 includes $2,784.47 of interest to the approximate date of the issuance of the statement. If, contrary to the decision of the Court of Claims and the contentions of the plaintiff as above outlined, this Court should hold that the item of $18,875.72 is not properly included in the judgment, then any interest with which the plain-

tiff's goods were charged in favor of the United States, should also be eliminated. This would reduce the debit in general average payable by these interests from $8,909.08 to $6,124.61, and deducting the latter amount from the credit allowance of $38,132.76 would leave a balance receivable in any event of $32,008.15.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed, with costs.

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